Ketua Pengarah Kastam dan Eksais v Coach Malaysia Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(IM)-338–09 OF 2017
UMI KALTHUM, ABDUL RAHMAN SEBLI AND ZALEHA YUSOF JJCA
22 JANUARY 2019

Civil Procedure — Judicial review — Appeal against — Whether there was non-compliance with O 53 r 3(6) of the Rules of Court 2012 — Whether there was good reason for grant of extension of time to file leave by High Court judge — Whether application premature and misconceived — Whether there was alternative remedy under s 124 of the Goods and Services Tax Act 2014 — Goods and Services Tax Act 2014 ss 124 & 167(3) — Rules of Court 2012 O 53 r 3(6) & (7)

This was an appeal from the decision of the learned High Court judge in granting the respondent's application for judicial review for the relief of certiorari to quash the decision to reject the respondent's application to the special refund of sales tax for goods under the Goods and Services Tax Act 2014 ('the GST Act'), an order of mandamus for the special refund of sales tax for goods held on hand amounting to RM5,120,368.28, and for an extension of time under O 53 r 3(7) of the Rules of Court 2017 ('the Rules'). The appellant raised the issues that: (a) there was non-compliance with O 53 r 3(6) of the Rules and there was no good reason for the grant of an extension of time; and (b) the respondent's application for judicial review was premature as there was an alternative remedy under s 124 of the GST Act. In respect of the first issue, the appellant submitted that the respondent's application for leave was outside the three-month limitation period as time began to run from 18 January 2017, the date the appellant's decision was uploaded onto the respondent's TAPS account. On the other hand, the respondent argued that it only came to know of the decision on 2 June 2017 ie after the respondent received the TAPS account password from its auditor the day before.

Held, allowing the appellant's appeal with costs of RM5,000 and setting aside the decision of the High Court:

(1) One 'good reason' is enough to entitle the applicant an extension of time however it is a matter for the judicial exercise of the judge's discretion (see para 15).

(2) By virtue of s 167(3) of the GST Act, the appellant's decision that was uploaded to the appellant's TAPS account on 18 January 2017 was deemed to have been served on the respondent on the same date. The

learned judge was therefore right in holding that this was the date the decision was 'communicated' to the respondent for the purposes of O 53 r 3(6) of the Rules (see para 30).

(3) The respondent's excuse for the inordinate delay in filing the leave application was unacceptable. It was the duty of the respondent to monitor its TAPS account and not to blame its own auditor for missing the deadline. In any event, the delay cause by the auditor, even if true, was the respondent's internal problem and had nothing to do with the appellant. The appellant should not be put at a disadvantage due to the respondent's lack of care in managing its TAPS account. In the circumstances, the learned judge was wrong in accepting the reason as a 'good reason' to justify an extension of time (see paras 30–33).

(4) The respondent's application for judicial review was premature as there was an alternative remedy under s 124 of the GST Act which had not been exhausted. The respondent failed to show 'very exceptional circumstances' for going for a judicial review instead of applying for a review under s 124 of the GST Act (see paras 34 & 38).

[Bahasa Malaysia summary

Ini merupakan satu rayuan daripada keputusan hakim Mahkamah Tinggi yang bijaksana yang telah membenarkan permohonan responden untuk semakan kehakiman untuk relif centiorari untuk mengetepikan keputusan untuk menolak permohonan responden untuk pembayaran balik khas cukai jualan bagi barangan di bawah Akta Cukai Barangan dan Perkhidmatan 2014 ('Akta GST'), satu perintah mandamus untuk pembayaran balik cukai jualan bagi barang dalam pegangan berjumlah RM5,120,368.28, dan untuk pelanjutan masa di bawah A 53 k 3(7) Kaedah-Kaedah Mahkamah 2012 ('Kaedah tersebut'). Perayu membangkitkan isu bahawa: (a) wujud ketidakpatuhan dengan A 53 k 3(6) Kaedah tersebut dan tiada sebab yang munasabah untuk membenarkan pelanjutan masa; dan (b) permohonan semakan kehakiman responden adalah pra-matang kerana wujudnya remedi alternatif di bawah s 124 Akta GST. Berkenaan dengan isu pertama, perayu menghujahkan bahawa permohonan responden untuk kebenaran adalah diluar tempoh had masa, memandangkan tempoh bermula daripada 18 Januari 2017, tarikh keputusan perayu dimuat naik kepada akaun TAPS responden. Responden pula menghujahkan bahawa mereka hanya mengetahui keputusan tersebut pada 2 Jun 2017 iaitu selepas responden menerima kata laluan akaun TAPS miliknya daripada juruaudit sehari sebelum itu.

Diputuskan, membenarkan rayuan perayu dengan kos RM5,000 dan mengetepikan keputusan Mahkamah Tinggi:

(1) Satu alasan baik adalah mencukupi untuk membenarkan pemohon pelanjutan masa, namun ianya adalah satu perkara yang melibatkan

penggunaan kehakiman budi bicara hakim (lihat perenggan 15).

(2) Selara dengan s 167(3) Akta GST, keputusan perayu yang dimuat naik kepada akaun TAPS perayu pada 18 Januari 2017 adalah disifatkan telah diserahkan kepada responden pada tarikh yang sama. Hakim bijaksana adalah betul apabila memutuskan bahawa ini adalah tarikh keputusan tersebut telah dimaklumkan kepada responden untuk tujuan A 53 k 3(6) Kaedah tersebut (lihat perenggan 30).

(3) Alasan responden untuk penangguhan melampau dalam memfailkan permohonan izin tidak boleh diterima. Adalah menjadi tanggungjawab responden untuk memantau akaun TAPS miliknya dan tidak menyalahkan juruauditnya semasa melampaui tarikh akhir. Dalam apa perkara sekalipun, penangguhan yang disebabkan oleh juruaudit tersebut, sekiranya benar, merupakan masalah dalaman responden dan tiada kaitan dengan perayu. Perayu tidak sepatutnya diletakkan dalam keadaan yang merugikan kerana sikap responden yang tidak menghiraukan pengurusan akaun TAPS miliknya. Dalam keadaan ini, hakim yang bijaksana terkhilaf dalam menerima alasan tersebut sebagai alasan munasabah untuk membenarkan pelanjutan masa (lihat perenggan 30–33).

(4) Permohonan semakan kehakiman responden adalah pra-matang kerana wujudnya remedi alternatif dibawah s 124 Akta GST yang belum luput. Responden gagal untuk menunjukan keadaan yang amat luar biasa untuk menguna pakai semakan kehakiman dan bukannya memohon untuk semakan di bawah s 124 Akta GST (lihat perenggan 34 & 38).]

Notes

For cases on appeal against judicial review, see 2(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5933–5935.

Cases referred to

Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 3 MLJ 145, FC (refd)

Government of Malaysia & Anor v Jagdis Singh [1987] 2 MLJ 185, SC (refd)

Ratnam v Cumarasamy & Anor [1965] 1 MLJ 228, PC (refd)

Seruan Gemilang Makmur Sdn Bhd v Pegawai Kewangan Negeri Pahang [2016] 2 MLJ 225; [2016] 4 CLJ 100, CA (refd)

Tan Siew Peng v OCBC Bank (M) Bhd [1998] 2 MLJ 420, CA (refd)

Tengku Anoomshah bin Tengku Zainal Abidin & Anor v Collector Land Revenue, North-East District, Penang & Anor [1995] MLJU 410; [1995] 3 CLJ 434, HC (refd)

Tunku Yaacob Holdings Sdn Bhd v Pentadbir Tanah Kedah & Ors [2016] 1 MLJ 200, FC (refd)

Wong Kin Hoong & Anor (suing for themselves and on behalf all of the occupants

of Kampung Bukit Koman, Raub, Pahang) v Ketua Pengarah Jabatan Alam Sekitar & Anor [2013] 4 MLJ 161, FC (refd)

Legislation referred to

Goods and Services Tax Act 2014 ss 20, 124, 166, 167(1)(c), (3), 190, 191, Parts I, II, IV, VI, IX, XIII, XVI, XVII, XVIII
Rules of Court 2012 O 53, O 53 r 3(6), (7)

Appeal from: Application for Judicial Review No WA-25–193–07 of 2017 (High Court, Kuala Lumpur)

Farah Ezlin Yusop Khan (Syamimi Farhana with him) (Federal Counsel, Attorney General's Chambers) for the appellant.
Mohd Arief Emran bin Arifin (Jason Liang and Kelvin Hong Meng Chong with him) (Wong & Partners) for the respondent.

Abdul Rahman Sebli JCA (delivering judgment of the court):

[1] The appellant's appeal was against the decision of the Kuala Lumpur High Court granting the respondent's application for judicial review. We allowed the appeal and these are our grounds.

[2] The respondent's application for judicial review was for the following reliefs:

(i) an order of certiorari to quash the appellant's decision dated 18 January 2017 that the respondent's application for the special refund of sales tax for goods held on hand pursuant to s 190 of the Goods and Services Tax Act 2014 ('the GST Act') was rejected without any justification or reasoning;

(ii) an order of mandamus directing the appellant to refund the sum of RM5,120,368.28 for the special refund of sales tax for goods held on hand to be paid to the respondent by the appellant upon the final determination of the judicial review;

(iii) if the respondent's application was found to have been out of time, that the respondent be granted an extension of time pursuant to O 53 r 3(7) of the Rules of Court 2012 ('the Rules');

(iv) that the costs of and/or incidental to the application be costs in the cause; and/or

(v) such further, alternative, consequential or other relief as the court deemed fit and proper in the circumstances.

[3] The learned judge allowed prayer (iii) above and thereafter proceeded to

hear the merits of the respondent's application for review, at the conclusion of which she allowed the application. A

[4] The salient facts are these. The respondent is a company incorporated in Malaysia on 22 March 2011 and is in the retail business of importing fashion apparels and accessories under the 'Coach' brand name designed and produced by the respondent's holding company, Coach Inc for the purpose of being sold to its Malaysian customers. The respondent retails its goods through its 18 outlets in various locations in Malaysia. B

[5] With the introduction of the GST Act which came into force on 1 July 2014 (Parts I, II, IV, VI and XVI) and on 1 April 2015 (Parts IX, XIII, XVII and XVIII), the respondent applied for registration and became registered under s 20 with effect from 1 April 2015. C

[6] The GST Act has since been repealed. However, the repeal has no bearing on the outcome of this appeal as the respondent was still subject to the GST Act when the cause of action arose. D

[7] On 29 September 2015, the respondent submitted an application to the Director General of Customs ('the DG') for a special refund of sales tax for goods held on hand pursuant to s 190 of the GST Act. The application was made online by the respondent and was in respect of 'women's and men's bags, women's and men's small leather goods, business cases, footwear, wearables including outerwear, watches, weekend and travel accessories, scarves, sunwear, fragrance, travel bags and other lifestyle products'. The total amount of special refund that the respondent applied for was RM5,120,388.28. E F

[8] The respondent claimed that it had satisfied all the requirements for the special refund application as stipulated by ss 190 and 191 of the GST Act. G

[9] By email dated 9 December 2015, the DG requested for additional supporting documents and further information from the respondent for sales tax audit purposes. The request was complied with by the respondent vide email dated 16 December 2015 by handing over the physical copies of the relevant documents and information to the DG, which was received by the DG on 21 December 2015. H

[10] On 18 January 2017, the appellant informed the respondent that its special refund application was rejected. The decision was conveyed to the respondent by uploading the rejection letter to the respondent's Taxpayer Access Point System account ('TAPS account'). The appellant followed this up by sending a notification of the decision to the respondent's email address at coachmalaysiagst@coach.com on 19 January 2017. I

[11] Dissatisfied with the decision, the respondent filed for judicial review, which as we mentioned, was allowed by the High Court. Hence the present appeal by the appellant.

[12] At the commencement of the hearing, the learned senior federal counsel raised the following issues:

(1) there was non-compliance with O 53 r 3(6) of the Rules and there was no good reason for the grant of an extension of time; and

(2) the application was premature and misconceived as there was an alternative remedy, ie a provision allowing for review under s 124 of the GST Act.

[13] With regard to issue (1) above, O 53 r 3(6) of the Rules provides as follows:

> 3(6) An application for judicial review shall be made promptly and in any event within three months from the date when the grounds of application first arose or when the decision is first communicated to the applicant.

[14] Order 53 r 3(7), however, gives the court the discretion to grant an extension of time if it considers that there is a good reason for doing so. We reproduce below O 53 r 3(7) for ease of reference:

> (7) The Court may, upon an application, extend the time specified in rule 3(6) if it considers that there is a good reason for doing so.

[15] By the terms of the order, one 'good reason' is good enough to entitle the applicant to an extension of time. It is a matter for the judicial exercise of the judge's discretion. On the attitude of the appellate court in respect of the exercise by the judge of the discretion vested in him, the Privy Council in *Ratnam v Cumarasamy & Anor* [1965] 1 MLJ 228 provided the following useful guideline:

> The principles upon which a court will act in reviewing the discretion exercised by the lower court are well settled. There is a presumption that the judge has rightly exercised his discretion (*Charles Osenton & Co v Johnson* [1942] AC 130 per Lord Wright at p 148). The court will not interfere unless it is clearly satisfied that the discretion has been exercised on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice (*Evans v Bartlam* [1937] AC 473).

[16] The burden is on the applicant who seeks an extension of time to make available sufficient material upon which the court may exercise the discretion in his favour: see *Tan Siew Peng v OCBC Bank (M) Bhd* [1998] 2 MLJ 420 (CA).

[17] There is sufficient adjective law on the effect of failure to comply with the limitation period prescribed by O 53 r 3(6) of the Rules. Suffice it if we refer to just four of them. In *Tengku Anoomshah bin Tengku Zainal Abidin & Anor v Collector Land Revenue, North-East District, Penang & Anor* [1995] MLJU 410; [1995] 3 CLJ 434, Vincent Ng Kim Khoay J in his judgment said at p 439:

> On general principles, this court has no inherent jurisdiction to extend time except where such power is expressly given to it under the provision of the law. See *Central Electricity Board v Commissioner of the Federal Capital & Anor; Insurance Company of North America – 3rd Party* [1967] 2 MLJ 161. However, the words 'or, ... except where the delay is accounted for to the satisfaction of the Court or Judge to whom the application for leave is made' in O 53 r 1A, which deals with the applications, would sufficiently clothe the court with powers to extend time to enable the aggrieved party to apply for leave to issue an order of certiorari. But though the court has an unfettered discretion to grant or refuse an extension of time, the rules of court must prima facie be obeyed; and in order to justify an extension of time, there must be some material on which the court can exercise its discretion in favour of the applicant. For otherwise the party in breach of the rules would have an unfettered right to extension of time which would defeat the very purpose and object of the rules of limitation of period. See *Ong Guan Teck & Ors v Hijjas* [1982] 1 MLJ 105.

[18] In *Wong Kin Hoong & Anor (suing for themselves and on behalf all of the occupants of Kampung Bukit Koman, Raub, Pahang) v Ketua Pengarah Jabatan Alam Sekitar & Anor* [2013] 4 MLJ 161 the Federal Court came to the following conclusion:

> [30] In conclusion, we are of the view that the time frame in applying for judicial review prescribed by the Rules is fundamental. It goes to jurisdiction and once the trial judge had rejected the explanation for the delay for extension of time to apply for judicial review, it follows that the court no longer has the jurisdiction to hear the application for leave for judicial review. Whether the application has merits or not, is irrelevant.

[19] In *Seruan Gemilang Makmur Sdn Bhd v Pegawai Kewangan Negeri Pahang* [2016] 2 MLJ 225; [2016] 4 CLJ 100, this court held as follows:

> [78] In our view, the prima facie rule is that an application to apply for leave for judicial review made outside the prescribed period will not be entertained and it is a pre-condition to the exercise of discretion in his or her favour that the applicant show an *(sic)* 'a good reasons' of the delay. The court would not grant the application for extension unless positively satisfied it is proper to do so. The judicial rulings indicate that when explanations for delay will be acceptable may vary according to the circumstances of each case.
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> [79] The settled law is that the operative time for the ground to have arisen, and which set the timeline within which the application is to be made, is the date when the first decision communicated to the applicant.

[20] Last but not least, the Federal Court case of *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 3 MLJ 145 where it was held that the stringent conditions imposed by O 53 of the Rules are intended to protect those entrusted with the enforcement of public duties against groundless harassment and to reduce delays in resolving applications in the interest of good administration. The court went on to say at p 172:

> However, O 53 of the RHC sets out a specific procedure for an aggrieved party seeking relief, including a declaration, against a public authority on his infringed right protected to which he was entitled to protection under public law to follow. It is our view that when such an explicit procedure is created to cater for this purpose, then as a general rule all such application for such relief must commence according to what is set down in O 53 of the RHC otherwise it would be liable to be struck off for abusing the process of the court.

[21] Coming back to the present appeal, the appellant's contention was that the respondent's application for leave was outside the three-month limitation period prescribed by O 53 r 3(6) of the Rules. It was submitted that time began to run from 18 January 2017, the date the appellant's decision was uploaded onto the respondent's TAPS account. The learned judge accepted this proposition when she said at para [27] of her grounds of judgment:

> [27] I am of the considered opinion and I agree with learned senior federal counsel for the DG that the decision had been communicated to the applicant via uploading it into the applicant's TAP System account on 18 January 2017. A notification was also sent by email on 19 January 2017.

[22] Measured from 18 January 2017, the last date for the respondent to file the leave application therefore fell on 18 April 2017. As such, the respondent was three months out of time by the time it filed the leave application on 17 July 2017.

[23] It was submitted on behalf of the appellant that the respondent should have known of the rejection decision as the email address to which the notification was sent on 19 January 2017 was provided by the respondent itself when it registered for the TAPS account.

[24] The respondent however contended that it was still within time to file the leave application. The reason given was that it only came to know of the decision on 2 June 2017, and this was after receiving the TAPS account password from its auditor the day before, that is, on 1 June 2017. According to the respondent, this was the date the decision was 'communicated' to it within the meaning of O 53 r 3(6) of the Rules.

[25] What the respondent was implying was that it did not even know the password to its TAPS account. It had to wait for its auditor to give it the password to gain access to the TAPS account. It is obvious that the respondent was putting the blame on the auditor for its delay in filing the leave application. The learned judge had this to say in allowing the respondent's application for an extension of time:

> [34] Having considered the factual matrix of this case, I am of the considered opinion that the circumstances in this case warrant an exercise of the court's discretion to extend time in the applicant's favour. The applicant has not slept on its rights. The applicant had responded to the DG's request for documents and information promptly between 9 December 2015–13 June 2016. From 27 June 2016–22 November 2016, the applicant has made several inquiries to the DG on the status of its application for a refund, but the DG failed to respond to the same.

[26] Her Ladyship then referred to the decision of the Federal Court in *Tunku Yaacob Holdings Sdn Bhd v Pentadbir Tanah Kedah & Ors* [2016] 1 MLJ 200 and went on to say:

> [36] Added to that, the applicant genuinely did not know about the Decision as they were not informed of the same by their former GST provider, Mazars. This can beseen from exh A17, where the applicant's employee had emailed Alicia Chin of Mazars if Alicia Chin would login the customs TAP website and 'check if we have received any response'. Upon receipt of the TAP login access from Mazars, the applicant then found out about the decision and filed this application without undue delay.

[27] The appellant's answer to the reason given by the respondent for the delay was that this was not the first time that such decision was communicated to the respondent using the TAPS account, and the respondent had been using the system ever since it was registered on 1 April 2015. There was therefore no valid excuse for the respondent not to act promptly.

[28] The TAPS account was an electronic service and its use was statutorily prescribed by s 166 of the repealed GST Act, which provided as follows:

> 166 Use of electronic service
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> (1) Notwithstanding any other provision of this Act and subject to regulations made under this Act, the Director General may provide an electronic service to any registered user for —
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> (a) the filing or furnishing of any application, return, declaration or any other document; and
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> (b) the service of any notice, direction, order, permit, receipt or any other document.
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> (2) Where an electronic notice is made and transmitted to the Director General, the

Director General shall not be liable for any loss or damage suffered by the registered user by reason of any error or omission of whatever nature or however arising appearing in any electronic notice obtained by the registered user under the electronic service if the error or omission was made in good faith and in the ordinary course of the discharge of the duties of the Director General or occurred or arose as a result of any defect or breakdown in the service or in the equipment used for the provision of the service.

(3) Any electronic notice made and transmitted by the registered user shall be deemed to have been filed, furnished or served at the time the electronic notice is received by the Director General.

(4) For the purposes of this section, 'registered user' means any person who is authorized in writing by the Director General to gain access to and use the electronic service.

[29] For service of documents, the mode was prescribed by s 167(1)(c) of the GST Act, which reads:

167 Service of notices

(1) Every notice, direction or any other document required by this Act to be served on any person may be served —

(a) ...

(b) ...

(c) ...

(2) ...

(3) Where a person has given his consent for a notice to be served on him through the electronic service, the notice shall be deemed to have been served at the time when the electronic notice is transmitted to his account through the electronic service.

[30] Thus, by virtue of s 167(3) of the GST Act, the appellant's decision that was uploaded to the appellant's TAPS account on 18 January 2017 was deemed to have been served on the respondent on the same date. The learned judge was therefore right in holding that this was the date the decision was 'communicated' to the respondent for the purposes of O 53 r 3(6) of the Rules.

[31] The respondent's excuse for the inordinate delay in filing the leave application is unacceptable. It was the duty of the respondent to monitor its TAPS account and not to blame its own auditor for missing the dateline. The respondent's claim that it did not even know the password to its own TAPS account is hard to believe and is equally unacceptable.

[32] In any event, the delay caused by the auditor, even if true, was the

respondent's internal problem and had nothing to do with the appellant. The appellant should not be put at a disadvantage due to the respondent's lack of care in managing its TAPS account.

[33] In the circumstances, we were of the view, with due respect to the learned judge, that she was wrong in accepting the reason as a 'good reason' to justify an extension of time. It will be setting a dangerous precedent for the court to allow such kind of excuse as a way to overcome the limitation period prescribed by the law.

[34] We further agreed with the learned senior federal counsel that the appeal should be allowed on another ground, and that is, the respondent's application for judicial review was premature as there was an alternative remedy available to it under s 124 of the GST Act. The provision was couched in the following language:

> 124 Application for review
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> (1) Any person may apply to the Director General within thirty days from the date the person has been notified of any decision made by an officer of goods and services tax for the review of the decision and provided no appeal has been made on the same matter to the Tribunal or court.
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> (2) Where an application has been made under subsection (1), the Director General shall make a decision and notify the person within sixty days from the date of the application is received or within the time practicable.
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> (3) An application under subsection (1) shall be made in the prescribed manner and prescribed form.

[35] What the provision meant was that any person aggrieved by the decision of the DG may apply, within thirty days of the notification of the decision, for a review of the decision, provided no appeal was made to the tribunal or to the court within that period.

[36] This was not done by the respondent. In our view the intention of the Legislature then was clear, and that was for the person aggrieved by the decision of the DG to first exhaust the internal remedy before appealing to the tribunal or to the court.

[37] In *Government of Malaysia & Anor v Jagdis Singh* [1987] 2 MLJ 185, the Supreme Court reiterated the following principle:

> A clear principle is reiterated here ie it is not a rigid rule that whenever there is an appeal procedure available to the applicant he should be denied judicial review. Judicial review is always at the discretion of the court but where there are other

A avenue or remedy open to the applicant it will only be exercised in very exceptional circumstances.

[38] The respondent had not shown 'very exceptional circumstances' for going for judicial review instead of first applying for review under s 124 of the
B GST Act.

[39] It was for all the reasons aforesaid that we allowed the appellant's appeal with costs of RM5,000 and set aside the decision of the High Court.

C *Appellant's appeal allowed with costs of RM5,000 and decision of High Court set aside.*

Reported by Izzat Fauzan

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